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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

Nos. 357 and 358

CIRACO MANEJA, ET AL.,
Petitioner,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Respondent.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Petitioner.

vs.

CIRACO MANEJA, ET AL.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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MOTION BY AMERICAN FARM BUREAU FEDERATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The American Farm Bureau Federation, through its attorneys, respectfully moves for leave to file a brief *amicus curiae* in the above captioned cases. The consent of all of the parties in the above captioned causes to the filing of a brief *amicus curiae* was sought. The attorney for Waialua Agricultural Company, Limited, by letter dated February 14, 1955, consented, but the attorney for Ciraco Maneja, *et al.*, by letter dated February 9, 1955, refused to consent to the filing of such a brief.

The American Farm Bureau Federation is a nonprofit

corporation organized under the laws of the State of Illinois and having its principal office at 222 West North Bank, Chicago 54, Illinois. It is a general farm organization organized to promote, protect and represent the interests of the farmers of the United States. It has a membership of more than 1,600,000 farm families with members in all of the states of the United States and in Puerto Rico. While the American Farm Bureau Federation is not a party to the case, its membership throughout the United States will be affected by the decision in this case. It is, therefore, requested that the American Farm Bureau Federation be allowed, as a representative of agriculture, to indicate the views of the latter by means of the accompanying brief as regards the issues herein involved. The parties hereto are solely concerned, and properly so, with a specific controversy as is reflected in their briefs. Since, for the reasons previously stated, the issues and their ramifications are much broader in scope than these briefs would indicate, the American Farm Bureau Federation desires to present to this Court additional information and arguments.

The above entitled causes involve the construction and interpretation of the agricultural exemption contained in the Fair Labor Standards Act (29 U. S. C. Sec. 201, *et seq.*). Specifically, a decision by this Court will necessitate a determination of whether certain activities performed in conjunction with and in furtherance of the Waialua Agricultural Company's farming operations fall within the purview of the above mentioned agricultural exemption.

The subject case involves the application of the agriculture exemption in the Act to only the operations of a Hawaiian sugar plantation. But as pointed out by the Court of Appeals below, the statutory exemption "is a charter for the mainland farmer" (R. 743), so that the interpretation

placed upon it by this Court will apply to agricultural operations upon all commodities, whether on the mainland or in Hawaii and the other Territories and possessions of the U. S. (R. 743-744). The Court of Appeals in its earlier opinion also recognized that the decision here would apply to all agricultural operations and not only to the specific situation presented here of Hawaiian sugar operations (R. 831, 840).

The Government likewise, in its Memorandum filed in support of the employees' petition for certiorari in No. 357, emphasized that the decision here would affect not only workers in the sugar industry, but large numbers of employees engaged in similar operations related to other agricultural products, such as fruits, vegetables, wheat, tobacco, etc. (Gov't. Memo, p. 12).

We submit that upon the authority of *Ford Motor Co.* v. *Huffmann,* 345 U. S. 330, 343, this Court should grant the American Farm Bureau Federation leave to file a brief *amicus* as here requested. In the cited case this Court referred to the several briefs of *amici curiae,* as showing the widespread acceptance and relevance in collective bargaining contracts generally of the type of provisions before the Court in that case, even though the only problem before the Court concerned certain specific provisions in the collective bargaining contract between Ford Motor Company and a single specific union.

Respectfully submitted,

s/ PAUL E. MATHIAS,
PAUL E. MATHIAS,
43 East Ohio Street,
Chicago 11, Illinois,
Attorney for American Farm Bureau Federation.

NOTICE OF MOTION.

To: Richard Gladstein
Attorney for Ciraco Maneja, et al.
240 Montgomery Street
San Francisco 4, California

Rufus G. Poole
Attorney for Waialua Agricultural Company, Limited
1625 K Street, N. W.
Washington 6, D. C.

PLEASE TAKE NOTICE that on the 21st day of February, 1955, the undersigned will file the above Motion and accompanying Brief in the office of the Clerk of the Supreme Court of the United States, said Motion to be considered at the convenience of the Court.

s/ PAUL E. MATHIAS,
PAUL E. MATHIAS,
43 East Ohio Street,
Chicago 11, Illinois,
Attorney for American Farm Bureau Federation.

AFFIDAVIT OF SERVICE.

George E. Merker, Jr., being duly sworn, deposes and says that in compliance with paragraph 33(1) of this Court's Rules, he deposited a copy of the above Motion and Notice of Motion in the United States Post Office in the City of Chicago, properly addressed to Richard Gladstein, 240 Montgomery Street, San Francisco 4, California, and to Rufus G. Poole, 1625 K Street, N. W., Washington 6, D. C., with first-class air mail postage fully prepaid on the 18th day of February, 1955.

s/ GEORGE E. MERKER, JR.,
GEORGE E. MERKER, JR.,
Of Counsel.

Subscribed and sworn to before me this 18th day of February, 1955.

s/ FRANK BURNJAS,
Frank Burnjas, Notary Public.

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Respondent.

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

STATEMENT.

On November 8, 1954, by order entered (R. 843, 844), this Court granted the separate Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, theretofore filed with it by both Ciraco Maneja, *et al.* (hereinafter called the employees), in No. 357 and Waialua Agricultural Company, Limited (herein-

after called Waialua) in No. 358, and consolidated the two cases hereinabove named for argument.

This brief relates only to the questions presented in No. 357 as set forth in Waialua's Brief, pp. 5-6 and does not attempt to enter into the questions presented in No. 358.

The American Farm Bureau Federation (hereinafter called Farm Bureau) is a nonprofit corporation organized under the laws of the State of Illinois having its principal office at 222 West North Bank, Chicago 54, Illinois. It is a general farm organization of more than 1,600,000 farm families in all of the States of the United States, and Puerto Rico.* The objects of the Farm Bureau are to promote, protect and represent the business, economic social and educational interests of the farmers of the United States, and generally to develop agriculture.

The interest of the Farm Bureau in this case derives from the fact that the decision of the District Court, which the employees seek to have this Court approve, would deprive all farmers in the U. S. of the agriculture exemption in the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201, *et seq.*) with respect to many activities, which, under the controlling case law and the administrative interpretations of the U. S. Department of Labor, clearly fall within the language and purpose of the exemption. Farmers in the U. S. have relied upon such judicial and administrative authority and have operated thereunder since the passage of the Act in 1938.

The employees would deny the agricultural exemption to many common everyday activities performed by most American farmers and farms. Such activities are: (1) the haul-

* While the Hawaiian Farm Bureau Federation is not as of the date of this brief a member of the American Farm Bureau Federation, the Hawaiian Farm Bureau Federation has been apprised of the action here taken by the American Farm Bureau Federation and favors the position and action taken.

ing by the farmer of the farm's products to a storage place or a processing plant located either on or off the farm or to any market; (2) the hauling of feed, fertilizer, seed, other agricultural supplies, agricultural equipment and laborers from one part of the farm to another; (3) the hauling by the farmer of necessary farm supplies and equipment from a nearby town to the farm; (4) the maintenance, repair and operation by the farmer of his trucks, vehicles and other hauling facilities, including maintenance of field roads on the farm; (5) the repair and overhauling by the farmer or on the farm of farm machinery, equipment and implements; (6) the maintenance and repair by the farmer or on the farm of farm buildings and grounds and tools and implements used in the farm operation; and (7) the processing by farmers or on the farm of agricultural products grown on the farm preparatory to marketing.

We contend that the above enumerated activities fall squarely within the agricultural exemption provided by the Act. If a decision holding otherwise is reached, then all American agriculture, and not only sugar cane farming, will be substantially deprived of the exemption which the Act now grants.

We respectfully submit that the language of the exemption provision (Section 13 (a) (6) of the Act), its legislative history, the case law and the administrative interpretations of the U. S. Department of Labor thereunder unassailably establish that such activities are exempt.

ARGUMENT.

EMPLOYEES ENGAGED IN THE AFOREMENTIONED ACTIVITIES ARE "EMPLOYED IN AGRICULTURE" WITHIN THE MEANING OF SECTION 3 (f) AND ARE THEREFORE EXEMPT FROM THE WAGE AND HOUR PROVISIONS OF THE ACT AS PROVIDED BY SECTION 13 (a) (6).

A. The Exemption Is Not Destroyed Because Farm Operations May Be Mechanized.

As the courts have recognized, the Act in Section 3 (f) contains a very broad, comprehensive and far-reaching definition of the term "agriculture." *McComb* v. *Farmers Reservoir Co.*, 337 U. S. 755, 762, *et seq.*; *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 612; *Damutz* v. *Pinchbeck*, 158 F. (2d) 882, 883 (C. C. A. 2). The definition does not distinguish between farming operations that are mechanized and those that are not mechanized, and the courts in the cases above cited have refused to recognize any such distinction. See also, *Miller Hatcheries* v. *Boyer*, 131 F. (2d) 283, 285 (C. C. A. 8). If an employee comes within the statutory definition, he is exempt without qualification, whether his operation is conducted by hand or by extremely complex machinery. For the past 35 years or more there have been great technological advances in American agriculture and the United States Department of Agriculture has encouraged such technological advances. These have taken place in the case of many varieties of farming. *Hopkins, Changing Technology and Employment in Agriculture.* (U. S. Department of Agriculture, 1941) p. 53. For example, the labor required on an acre of wheat in 1934-36 was half the amount needed in 1909-13. *Technology on the Farm* (U. S. Department of Agriculture, 1940) p. 61.

As part of this trend toward greater productivity, each census since 1880, with few exceptions, has shown an increase in the average size of farms. The most noticeable increases were in the areas best suited to the use of power equipment. *U. S. Census of Agriculture* (1945) Pt. II, p. 65. Approximately as of the date of enactment of the Fair Labor Standards Act, about 10% of the nation's farms accounted for 54% of the farm produce and 68% of the cash farm wage bill in the United States. *Supp. Rep. 1012. Pt. II, Committee on Education and Labor*, 79th Cong. 1st Sess., p. 77. The record in the present case demonstrates how these technological advances have taken place in the case of Waialua's sugar plantation (R. 114-116).

When Congress enacted the Fair Labor Standards Act in 1938, it was presumably aware of these technological forward strides in agriculture. Had it intended to distinguish in the exemption for agriculture written into the Act between those farms which are not mechanized and those which are, it could quite easily have expressed such intent. It did not do so, but as we shall show, simply defined the term "agriculture" in functional terms.

B. Section 3 (f) Was Intended to Exempt Anything the Farmer Does in Connection with Growing and Marketing His Crop and in Addition Anything That Is Done on the Farm in Connection with Growing and Marketing the Crops of That Farm.

The definition starts with "farming in all its branches." It then proceeds to enumerate specific activities including preparation of the soil, growing of agricultural commodities and harvesting of them. Finally the definition includes

> "any practices (including any forestry or lumbering operations) performed by a farmer *or* on a farm as an incident to *or* in conjunction with such farming opera-

> tions, including preparation for market, delivery to storage or to market or to carriers for transportation to market." (Emphasis supplied.)

Language could not be more clear to evince an intent to exempt all activities performed by the farmer or on the farm in connection with growing and marketing the farm's crops.

We consider briefly the terms "farm" and "farmer". Generally speaking the term "farm" means a tract of land or several tracts of land or fields owned or controlled by one or more persons and devoted to the production of agricultural products as a single enterprise under common management with common equipment and labor. Many farms consist of several and sometimes many separate tracts or fields. The operator of the farm has always been designated a "farmer". Most farmers are individuals. However, there are thousands of farming partnerships in the United States and in recent years it has been quite common for joint owners to incorporate rather than to operate as partners. All of such types of farmers are included within the membership of Farm Bureau.

Practically every farm in the United States, whether large or small, and whether it produces livestock, milk or grows grain, forage crops, seed, cotton, fruits or vegetables, tobacco or any other agricultural commodity, engages in one or more of the activities engaged in by Waialua Agricultural Company, Limited, (hereinafter called "Waialua"). Almost all farmers, as part of their harvesting operations, haul their crops to a storage place or a processing plant located either on or off the farm or to some market. A great many of them conduct extensive processing operations upon their own crops. For example, many fruit and vegetable farmers pack and can their own fruits and vegetables; many cotton farmers gin their own cot-

ton; many poultry and hog farmers slaughter and dress their poultry and hogs. The apple farmer, for example, may haul his apples to a storage place on the farm or he may sort, wrap and pack the apples and otherwise prepare them for market or he may process the apples in one form or another, or he may haul them to a packing or processing plant off the farm to which he sells them. The grain farmer may haul his grain to a storage place on his farm or to a nearby elevator to which he sells same; the dairy farmer may haul his milk to a bottling plant on his own farm or to a nearby bottling plant or creamery to which he sells same or he may bottle the fluid milk or process it into butter and cheese on his own farm and then transport the same to market; the cotton farmer may haul his cotton to a gin located on or off the farm, and so forth. Unquestionably, when so performed, these are operations performed by a farmer or on a farm as an incident to or in conjunction with farming operations; *Farmers Reservoir Co.* v. *McComb*, 337 U. S. 755, 763, 766, note 15; *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995 (S. D. Calif., 1940); *Damutz* v. *Pinchbeck*, 158 F. (2d) 882. All farmers likewise haul agricultural supplies and equipment to the particular field or fields of the farm where such supplies and equipment are to be used; all of them go to town with their trucks or other vehicles to pick up supplies and equipment for use on the farm; all do some maintenance work to keep in good usable condition their trucks or other vehicles or hauling facilities, including the field roads on the farm; all do some repair work on their agricultural equipment, machinery and implements; and all do some maintenance and repair work on the farm buildings and grounds, and on their tools and implements used in the farming operation. Without some or all of these various activities, no farm could grow or produce anything. Thus the contention of the employees

herein, if sustained, would apply to all farming and would effectively destroy the agricultural exemption for all farms and ranches and not only for the Hawaiian sugar plantations.

Furthermore, with respect to the various hauling activities, no distinction can be drawn on the basis of the medium used for such hauling. In some cases as in the case before the Court here, the medium used for bringing in the sugar crops to the mill was a narrow gauge railroad, although it appears from a recent Government report that many other methods of transportation are used on Hawaiian sugar plantations with a general trend toward large motor trucks. *The Economy of Hawaii in 1947*, Bureau of Labor Statistics, U. S. Department of Labor, Bulletin No. 926, p. 45. In the case of a small cotton or tobacco farmer, he may haul his cotton to the cotton gin or his tobacco to a tobacco stemmery by horse-drawn vehicle. In the case of a fruit farmer, for example, he may haul his fruit to a packing or processing shed or establishment by large truck. In many instances such trucks will carry 10 tons or more in weight. We note that in the case at bar the rail cars on the narrow gauge railroad averaged only 4¾ tons per car gross cane (R. 58). We also note that because of the technological advance in agricultural transportation, the said railroad was discontinued as a medium of transportation at this plantation late in 1952 as stated in the cause entitled *Waialua Agricultural Company, Limited* v. *United Sugar Workers I. L. W. U. Local 142*, 1953, 114 F. Supp. 243 (D. Hawaii) and the record therein. We cannot conceive of any basis upon which the type of vehicle used in the hauling could make any difference in the application of the exemption. As an economic matter the farmer, consistent with his means, will use that mode of transportation best suited for his type of farming. In all cases, however, whatever the

medium used, the hauling is simply an inseparable part of the farmer's operations of growing agricultural commodities, harvesting them and marketing them.

It is perfectly plain then that the statutory definition of agriculture when it refers to "farming in all its branches", "harvesting" and "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market", includes the activities listed, *supra*, pp. 2 and 3.

C. The Legislative History of Sections 13 (a) (6) and 3 (f) Confirms That All the Activities Here Described Were Intended to Be Exempt.

As the bill which finally became the Fair Labor Standards Act worked its way through the legislative mill to final passage, repeated assurances were given by members of the Congress that a full exemption had been accorded to all activities performed by the farmer or on the farm in connection with the growing and marketing of the farm's crops. All agreed that the agricultural exemption was to be plenary and that all agriculture without exception was excluded from the coverage of the Act. It is obvious from the legislative history that the bill never would have become law but for such assurances and the consequent feeling on the part of the legislators that *all* agriculture was in fact exempt. 83 Cong. Rec. 7393, 9257.*

The bill (S. 2475) was introduced in the Senate on May 24, 1937 and was referred to the Senate Committee on Education and Labor, which wrote into the bill a broad definition of "agriculture" and then reported it to the Senate.

* We are not setting forth any part of the text of the debates as representative portions are contained in pp. 45-51 and 90-96 of the brief filed herein by Waialua.

S. 2475 as reported in the Senate, July 6, 1937, Sec. 2, pp. 50-51. Senator Black, Chairman of the Senate Committee in charge of the bill, stated to the Senate that the bill specifically excluded workers in agriculture of all kinds and of all types. 81 Cong. Rec. 7648. When he made this statement the agricultural definition in the bill, insofar as it related to practices incidental to farming operations, limited the exemption to those practices "ordinarily" performed by a farmer as an incident to farming operations.

In various colloquies between Senator Black and other Senators, the former made it clear that the exemption applied to all the things the farmer did with reference to producing his crops and marketing them—whether the crops were cotton, fruits or vegetables, or any other commodity. 81 Cong. Rec. 7657, 7658, 7659. Senator McGill then proposed an amendment which was adopted with the approval of the Labor Committee, which amendment provided that the agricultural exemption should apply not only to practices ordinarily performed *by a farmer* as an incident to his farming operations, but also to practices ordinarily performed *on a farm* as an incident to such farming operations. His amendment further added to the exemption for agriculture the activity of "delivery to market". The purpose of the McGill amendment, as explained by its author, was to exempt *all* kinds of labor performed on a farm so long as it was "incidental to agricultural purposes" and was merely preparatory to the marketing of *any* field crop and *all* kinds of labor performed in connection with making delivery to market of agricultural products. The discussions on Senator McGill's amendment are abundantly clear that such amendment was intended to apply to any commodity produced on a farm—peanuts, fruits and vegetables, grain, livestock, sugar cane, etc. 81 Cong. Rec. 7888, 7927, 7928-7929.

The language added to the agricultural definition by Senator McGill's amendment remained in the bill and was ultimately part of the bill as enacted. No activities are more essentially "incidental to agricultural purposes" than those we are presently discussing. To deny exemption to them, as the employees herein have asked, is to flaunt the clearly expressed legislative purpose.

When the bill as passed by the Senate went to the House of Representatives, the House Labor Committee rewrote the agricultural exemption and purposely struck the word "ordinarily" from that part of the definition relating to incidental practices. H. Rep. No. 1452, 75th Cong., 1st Sess., pp. 4-5, 11. And the word "ordinarily" never again reappeared in the definition. The bill as it was first reported by the House Labor Committee was recommitted to such Committee and on April 21, 1938, another draft of S. 2475 was reported to the House. As so reported, once again the definition of "agriculture" was broadened by adding to the incidental practices portion of the definition the activities of "preparation for market", "delivery to storage", and "delivery . . . to carriers for transportation to market". H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2. It was in this form that the bill was passed in the House.

If there had been any doubt theretofore that the hauling by a farmer of his crops to a storage place or to carriers to transport same to market was exempt, such doubt was completely eliminated by the addition of the foregoing phrases to the definition.

The two Houses of Congress then held a conference on the bill. In such conference they retained every amendment that had previously broadened the definition of "agriculture". But they went further. They broadened the exemption still more by exempting *all practices performed by*

a farmer or on a farm "in conjunction with such farming operations". 83 Cong. Rec. 9253-9254. This further broadening is additional confirmation that Congress intended to include in the exemption all of the activities we are discussing, since all of them are obviously performed by the farmer or on the farm *in conjunction with* the farming operations of growing crops. All of them are vital to the growing operation which could not otherwise take place.

When the conference report was debated in the Senate, Senator Thomas of Utah, who had succeeded Senator Black as Chairman of the Senate Committee on Education and Labor, and was chairman of the Senate conferees, stated that agriculture was exempted from the operation of the bill, that he did not know of any kind of agriculture that was included in the bill, and that the definition of agriculture was purposely made all-inclusive. 83 Cong. Rec. 9162-9163.

The legislative history will be searched in vain for any hint that Congress intended by the agricultural exemption to exempt only small farms doing their work with hand labor. On the contrary, there was discussion concerning many highly mechanized operations and it was made plain by the proponents of the legislation that such operations would be exempt if they came within the definition. 81 Cong. Rec. 7656, 7657, 7658, 7659. The legislative purpose of the agriculture exemption was to spare the farmer additional costs. Furthermore, Congress recognized that farm operations, unlike industrial operations, cannot be regulated by the clock. The coming and going of the seasons do not await the pleasure of man. Sunshine, rain, humidity and warmth are not yet subject to man's control. The time to plant and the time to harvest are determined by the whims of nature. Calves, lambs and pigs are born at all hours of the day and night. Livestock must be fed and cows must be milked each day including Saturdays and Sun-

days. Plant and animal growth continues around the clock. Successful farming demands long hours of labor on certain days and few hours of abor on others. Frost, heat, humidity, rainfall, relative day and night temperature, presence or absence of pests or the incidence of disease or illness are the practical factors governing these demands. No limitation or regulation of the farmer's hours is possible in an efficient farming operation. This factor cannot be minimized because Hawai, and possibly a few other places where the Act is applicable enjoy so equable a climate that agricultural products can be grown and harvested there throughout the year. See the testimony of various witnesses at the Joint Hearings on S. 2475 and H. R. 7200 (the related House bill) held in June, 1937, Pt. 3, 81 Congressional Record, pp. 1007, 1083, 1120-1121, 1133-1134. Senator McAdoo speaking on the floor of the Senate in support of an amendment to the definition of agriculture which would have exempted "any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits",* stated the proposition thusly:

> "These agricultural commodities are highly perishable, and the work which must be done by the packing houses and on the farms varies greatly with temperature variations. Twenty-four hours in advance one cannot know whether the crop must be moved. So, to fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with the workers available. The broadening of the definition as I have suggested is not only directly in line with the object of the bill but will also protect the

* Senator McAdoo later withdrew his amendment when it was pointed out that an earlier amendment, already adopted by the Senate, covered the situation about which he was concerned. 81 Cong. Rec. 7927, 7928-7929.

> farmers, who, in my State at least, are engaged in a method of marketing, packing, and handling their crops which may differ from the methods employed in other States." (81 Cong. Rec. 7927.)

Whether or not the farmer's operations are mechanized, the farmer must do his work when he can, depending upon natural factors. Hence, Congress granted a complete exemption to all agriculture regardless of the mechanized character of the operation. The employees herein have ignored this Congressional purpose.

D. No Court Other Than the District Court Below Has Denied Exemption to the Activities in Question.

The judicial decisions under the Fair Labor Standards Act fully support our position that the activities listed *supra*, pp. 2 and 3 come within the agricultural exemption provided by the Act, and that it is irrelevant whether or not the farming operations are large or small, manual or mechanized. In addition to the cases cited on pages 4 and 7 *supra*, and those cited in Waialua's Brief, pp. 55 *et seq.*, the Court's attention is drawn to the following cases where the exemption was held applicable: *Jordan* v. *Stark Brothers Nurseries* (W. D. Ark. 1942), 6 Labor Cases ¶ 61,468 (employees of a nursery engaged in transporting trees from the fields where they were grown to a packing shed of the employer where they were sorted, graded, and tied into bunches for shipment); *Walling* v. *Craig*, 53 F. Supp. 479, 483 (D. Minn. 1943) (repair and reconditioning of bulldozers, tractors, and trucks devoted to agricultural activities); *Walling* v. *Peacock Corp.*, 58 F. Supp. 880, 883 (E. D. Wisc. 1943) (handling and milling of onion sets by the employees of an employer who grows the onion sets); *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995, 1006 (S. D. Calif., 1940) (packing by farmer of fruit he

grows himself or bottling by a farmer of honey gathered on his farm); *Dye* v. *McIntyre Floral Co.*, 176 Tenn. 527, 144 S. W. (2d) 752 (1940) (employees of a nursery, who receive, care for, and prepare for shipment nursery products grown by the nursery or purchased from others); *Belt* v. *Hodges* (N. D. Tex., 1941), 4 Labor Cases ¶ 60,664 (employee working for a farm implement dealer trading farm implements for livestock).

E. The U. S. Department of Labor Has Consistently Held All of the Activities in Question to Be Exempt Under Section 13 (a) (6).

1. Hauling of farm's products to a storage place or a processing plant located either on or off the farm or to any market.

(i) In *Interpretative Bulletin* No. 14, issued in August, 1939, 3 *C. C. H. Labor Law Reports* ¶ 24,488, the Department of Labor construing the agricultural exemption, stated:

> "If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term" *i. e.*, "practices . . . performed by a farmer . . . as an incident to or in conjunction with such farming operations". ¶ 10 (f).

(ii) In an opinion letter written by it, the Department expressed the view that employees of an alfalfa grower, who haul the alfalfa grown by that grower to a processing plant located off the farm, are exempt under section 13 (a) (6) WHM 35:754.

(iii) In paragraph 5 (a) of *Bulletin* 14, the Department stated that the term "harvesting of any agricultural or horticultural commodities", as used in section 3 (f), includes all "operations customarily performed in connec-

tion with the removal of the crops by the farmer from their growing position in the field, greenhouse, etc."

(iv) In paragraph 10 (c) of the *Bulletin*, the Department stated as follows with respect to the term "delivery to storage" appearing in the definition of "agriculture":

> "The term 'delivery to storage' includes taking the commodities, dairy products . . . to the places where they are to be stored or held pending preparation for or delivery to market".

(v) In paragraph 10 (d) of the *Bulletin*, the Department stated as follows with respect to the term "delivery . . . to market" appearing in the definition of "agriculture":

> "The term 'delivery . . . to market' includes taking the commodities, dairy products . . . to market".

(vi) In paragraph 10 (e) of the *Bulletin*, the Department stated as follows with respect to the term "delivery . . . to carriers for transportation to market" appearing in the definition of "agriculture":

> "The term 'delivery . . . to carriers for transportation to market' includes taking the commodities, dairy products . . . to a carrier—truck, railroad, ship, etc.—for transportation by such carrier to market".

(vii) In paragraph 10 (f) of the *Bulletin*, the Department stated that besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption. As one such practice he mentioned the actual selling of the agricultural or horticultural commodities, etc.

All of the foregoing opinions relate to hauling and marketing activities performed by the farmer. The Department, however, has also recognized that if hauling activi-

ties are confined to a particular farm and consist of hauling on that farm the crops grown thereon to a storage place or processing plant located on that farm, the agricultural exemption also applies to such hauling activities. Thus in paragraph 11 of its *Bulletin* No. 14, it dealt with the term "practices . . . performed . . . on a farm as an incident to or in conjunction with such farming operations" appearing in the definition of "agriculture". It stated that with the exception of "delivery to market", which necessarily involves working off the farm, the practices described in paragraph 10 of the *Bulletin*, even if performed by employees of someone other than the farmer, would be exempt so long as they were performed on the farm. And as we have already seen, among the practices described in paragraph 10 of the *Bulletin* were those of hauling crops to a storage place, processing plant or a carrier for transportation to market.

2. Hauling by the farmer of necessary farm supplies and equipment from a nearby town to the farm.

In paragraph 10 (f) of *Bulletin* No. 14, the Department stated:

> "The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt."

This example shows plainly that in the Department's view the hauling by the farmer's employees of agricultural supplies and equipment to the farm for use in the farming operations is exempt.

3. Operations functionally necessary to farming performed by the farmer or on the farm.

Included among such operations are the hauling of feed, fertilizer, seed, other agricultural supplies and agricultural equipment from one part of the farm to another; repair and maintenance by the farmer or on the farm of the farmer's hauling facilities, including field roads on the farm; repair by the farmer or on the farm of farm machinery, equipment and implements; and maintenance and repair by the farmer or on the farm of farm buildings and grounds and tools and implements used in the farming operation.

In paragraph 12 of *Interpretative Bulletin* No. 14, the Department said as follows:

> "We have received inquiries concerning office help —secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in section 3 (f). In our opinion such employees are exempt."

It is clear from this statement that the employees engaged in the above activities, all of which are not only performed in connection with the production and growing of agricultural commodities but are indispensable to such production and growing, are in the Department's opinion exempt.

In addition to the opinion expressed in paragraph 12 of *Bulletin* No. 14, the Department of Labor has expressed other opinions showing that any activities performed by the farmer or on the farm in connection with the growing and marketing of the farm's crops are exempt. Thus it has held the following activities to come within the agricultural exemption.

(i) The erection of a silo on a farm by employees of an independent contractor. *Interpretative Bulletin* No. 14, par. 11.

(ii) The removal of stumps by employees of an independent contractor from cut over timber land owned by a lumber company and now devoted by the lumber company to the growing of tung trees, where such removal and the plowing and fertilizing of the ground around the tung trees was necessary to the proper growth of the trees. WHM 35:751-752.

(iii) Sorting, grading, sizing and other practices performed on tobacco on the farm where grown by a company in the business of buying, warehousing and marketing tobacco, to which the farmer sells his tobacco. WHM 35:752-753.

(iv) Work on the farm by field men of a cannery to which the farmer had contracted to sell his crops, notwithstanding such field men from time to time report to the canning plant. 3 *C. C. H. Labor Law Reporter*, par. 25,242.203.

(v) Pre-cooling operations on the farm with respect to fruits and vegetables grown on the farm. 3 *C. C. H. Labor Law Reporter*, par. 25,242.21.

(vi) Logging operations performed by the farmer or on his farm with respect to timber blown down in a hurricane, which fallen timber presented a fire hazard and an impediment to the cultivation of the land. 3 *C. C. H. Labor Law Reporter*, par. 25,242.252.

(vii) Vining of peas grown on a farm by a vinery located thereon. 3 *C. C. H. Labor Law Reporter*, par. 25,242.281.

(viii) Tobacco stemming by a farmer or on a farm. 3 *C. C. H. Labor Law Reporter*, par. 25,242.344.

4. Preparation for market of products grown on the farm.

In paragraph 10 (b) of *Bulletin* No. 14 the Department stated:

"(b) The term 'preparation for market' must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

1. Grain, seed, and forage crops.—Weighing, binning, stocking, cleaning, grading, shelling, sorting, packing and storing.

2. Fruits and vegetables.—Assembling, binning, ripening, cleaning, grading, sorting, drying, preserving, packing, storing, and canning.

3. Nuts (pecans, walnuts, peanuts, etc.).—Grading, cracking, shelling, cleaning, sorting, packing, and storing, unshelled nuts; and performing the same operations except cracking and shelling, upon the nut meats.

4. Sugar.—Manufacturing raw sugar, cane, or maple syrup and molasses.

5. Eggs.—Handling, cooling, grading, and packing.

6. Wool.—Grading and packing.

7. Dairy products.—Salting, printing, wrapping, packing, and storing butter; ripening, molding, wrapping, packing, and storing cheese; and canning or packing any other dairy product.

8. Cotton.—Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.

9. Nursery stock.—Handling, wrapping, packaging, and grading.

10. Tobacco.—Handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing.

11. Livestock.—Handling and loading.

12. Poultry.—Culling, grading, cooping, and loading.

13. Honey.—Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.

14. Fur.—Removing the pelt, scraping, drying, putting on boards and packing."

5. American farmers have relied upon the interpretations of the Department in regarding their various farm activities as exempt.

According to a press release issued by the Department at the same time as *Interpretative Bulletin* No. 14, the Department's interpretations of the agricultural exemption in the Act were made only after lengthy conferences with representatives of employers, employees and other interested parties. Authorities of the United States Department of Agriculture were also consulted. Much time was devoted by the Department's attorneys to a study of the legislative history of Section 13 (a) (6). The Department also had its economists make economic studies in order to assist in a proper determination of the scope of the exemption. It was only after these lengthy investigations and discussions that the Department announced its opinions on the subject. Such opinions were widely circulated through *Interpretative Bulletin* No. 14, press releases and other releases to the various labor law publications.

Once the Department's interpretations were announced, the farmers of America relied upon such interpretations and were guided by them in compensating their employees. And such interpretations as above set forth were never modified. Since they comport with the language and spirit of the exemption provisions they should be accorded the respect which the Supreme Court has said is due the Department's interpretations. *United States* v. *American Trucking Ass'n. Inc.*, 310 U. S. 534, 549. As the Supreme

Court has also said, employers may properly resort to such interpretations for guidance. *Skidmore* v. *Swift*, 323 U. S. 134, 140. They should not be lightly discarded, in favor of wholly new interpretations, of which the farmer never before heard.

F. The Imposition of the Wage and Hour Requirements of the Act with Respect to the Activities in Question Would Create a Huge Retroactive Liability for the American Farmer.

Since the language and purpose of the agricultural exemption in the Act appear clearly to grant exemption from the wage and hour requirements thereof to the activities in question, and since the courts and the Department of Labor have consistently indicated that such activities are exempt, the American farmer has naturally assumed that he is in fact exempt. If now, seventeen years after the Act has gone into effect, he is to find that contrary to all indications many of his activities are not entitled to exemption, the retroactive liability to employees, if susceptible of measurement, could be enormous and will lead to great multiplicity of suits. The relationship between farmer employer and farm employee is more than an arrangement of employment. Usually the farm employee (and often his family with him) lives upon the farm. Often he has the privilege of producing on the farm commodities for his own consumption as well as other privileges. His interest in the farm cannot be limited to some eight, nine or ten hours each day or to a forty-hour or five-day week. The hours worked vary greatly with the seasons. Also, on many days there is no way to measure the number of hours the farm employee has devoted respectively to his employer's interests and to his personal interests. In most farm operations there is no satisfactory basis for

the keeping of time records. Farm employees are actually on the farm available when needed or in the event of an emergency, around the clock. If the Fair Labor Standards Act is now to be construed so that agriculture will not be exempt the retroactive liability to employees could be so measured as to mean financial ruin to a large number of farmers.

CONCLUSION.

For the foregoing reasons, the farm activities described herein and in the record of this case should be held exempt under the definition of "agriculture" as found in the Fair Labor Standards Act.

Respectfully submitted,

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AFFIDAVIT OF SERVICE.

George E. Merker, Jr., being duly sworn, deposes and says that in compliance with paragraph 33(1) of this Court's Rules, he deposited a copy of the above Brief in the United States Post Office in the City of Chicago, properly addressed to Richard Gladstein, 240 Montgomery Street, San Francisco 4, California, and to Rufus G. Poole, 1625 K Street, N. W., Washington 6, D. C., with first-class air mail postage fully prepaid on the 18th day of February, 1955.

s/ GEORGE E. MERKER, JR.,
GEORGE E. MERKER, JR.,
Of Counsel.

Subscribed and sworn to before me this 18th day of February, 1955.

s/ FRANK BURNJAS,
Frank Burnjas, Notary Public.